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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

J.S., Petitioner, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; ALAMEDA COUNTY SOCIAL SERVICES AGENCY et al., Real Parties in Interest.	A148411 (Alameda County Super. Ct. No. OJ16026111)

This writ arises from a dependency proceeding involving S.S., a girl born in June 2015. Petitioner J.S. signed a voluntary declaration of paternity (VDP) at S.S.'s birth, but subsequent genetic tests showed J.S. is not S.S.'s biological father, and the juvenile court set aside the VDP. The court declined to order reunification services for J.S. or for S.S.'s mother, T.W., and set a permanency planning hearing under Welfare and Institutions Code section 366.26.[1] J.S. filed a petition for extraordinary writ relief, contending the court erred in setting aside the VDP.[2] We stayed the section 366.26 hearing pending disposition of J.S.'s petition. We now conclude the court did not err by setting aside the VDP. We therefore deny J.S.'s petition and lift the stay of the section 366.26 hearing.

[1] All undesignated statutory references are to the Welfare and Institutions Code.

[2] S.S.'s mother, T.W., did not seek review of the court's order.

I. BACKGROUND

In January 2016, the Alameda County Social Services Agency (the Agency) filed a dependency petition on behalf of S.S. The petition and a subsequent detention report alleged that, for a period of three weeks, T.W. had left S.S. in the care of a friend who suffered from substance abuse and mental health issues, lacked adequate supplies or funds to care for S.S., and improperly stored S.S.'s formula, which could have caused S.S. to become ill. The petition alleged T.W. had a substance abuse problem, suffered from chronic mental health issues that impeded her ability to provide regular care for S.S., and lacked suitable housing. The petition alleged domestic violence occurred between J.S. and T.W. and resulted in J.S.'s arrest on August 8, 2015. A criminal protective order issued on September 1, 2015 restricted J.S.'s contact with S.S. and T.W.

The Agency took S.S. into protective custody on January 11, 2016 and subsequently placed her in foster care. At a detention hearing on January 14, 2016, the court appointed counsel for S.S., for T.W., and for the alleged father, J.S. T.W. and J.S. then testified under oath about paternity issues. T.W. testified that J.S. was not S.S.'s biological father. She testified the father was another man, who had provided a total of about $1,400 to $1,500 to T.W. for S.S.'s support since S.S. was born. T.W. testified J.S. knew he was not the biological father because he had told T.W. he could not have children. T.W. stated it became a "control situation" after S.S. was born. T.W. acknowledged that J.S.'s name appeared on S.S.'s birth certificate, and that he was present when S.S. was born. At the detention hearing, T.W.'s counsel objected to elevating J.S. to the status of presumed father.

J.S. testified he believed he was S.S.'s biological father. He did not provide for T.W. during most of her pregnancy. T.W. moved into his home about one week before S.S.'s birth. S.S. was born in late June. J.S. stated he signed a VDP at the hospital at the time of S.S.'s birth. J.S. was arrested on August 8, 2015 and spent 24 days in jail. When he was released, T.W. and S.S. had left his apartment. J.S. stated that, after his release, he avoided T.W. because of the protective order, but saw her "here and there." J.S. testified that, about one week after S.S. was born, T.W. told him that she believed another

man was S.S.'s father. T.W. told J.S. she had been raped. The court ordered DNA testing for J.S.

In a report filed in February 2016, the Agency recommended the court bypass reunification services for T.W. because she had failed to reunify with one of S.S.'s siblings. The Agency confirmed that J.S. had signed a VDP and that his name appeared on S.S.'s birth certificate. The Agency had conducted a search for the other alleged father but had been unable to locate him. The Agency reported that T.W. stated J.S. would follow her and take pictures. She stated that neighbors would hear J.S. yelling at her, and that he slammed a door on her hand. She stated he also withheld her mail about housing opportunities. The Agency's report attached a copy of the police report of the August 2015 domestic violence incident. According to the police report, T.W. stated that J.S. choked her and threw her to the ground, causing her to hit her head on the floor.

At a February 23, 2016 hearing that had been scheduled to address jurisdiction and disposition, the Agency's counsel informed the court that genetic tests showed J.S. was not the biological father of S.S. (The Agency later submitted the written test results to the court.) Also at the February 23, 2016 hearing, J.S. requested that the court elevate him to presumed father status. The court took the request under submission and continued the hearing.

On March 4, 2016, J.S. filed a brief asserting the signed VDP entitled him to presumed father status. On March 21, 2016, S.S.'s counsel filed a motion to set aside the VDP signed by J.S. and T.W. The Agency filed a brief concurring with S.S.'s counsel's position and asking the court to set aside the VDP.

On May 11, 2016, the court held a hearing on jurisdiction/disposition, the motion to set aside the VDP, and J.S.'s request to be elevated to presumed father status. The court admitted into evidence all reports submitted by the Agency. Counsel for the Agency and counsel for S.S. argued the court should set aside the VDP. Counsel for T.W., who previously had opposed elevating J.S. to presumed father status, stated she now had no objection to his designation as presumed father. Counsel for T.W. and

counsel for J.S. stated their clients had reconciled for the purpose of parenting S.S.; counsel for T.W. stated her client did not intend to resume a relationship with J.S.

After hearing argument, the court set aside the VDP, concluding it was in S.S.'s best interest to do so; J.S. remained an alleged father. In explaining its decision to set aside the VDP, the court noted J.S. had only lived with S.S. for about one and one-half months. The court was concerned that J.S. had taken himself out of S.S.'s life by his involvement in the domestic violence incident with T.W. The incident resulted in a probation violation and a new probation condition that, until April 2016, prohibited J.S. from having contact with T.W. and S.S.

Also at the May 11 hearing, the court found true the allegations in an amended dependency petition that incorporated changes agreed on by the parties. The court ordered reunification services bypassed for T.W. due to her failure to reunify with S.S.'s older sibling. (See § 361.5, subd. (b)(10).) The court declined to order reunification services for alleged father J.S. or the other alleged father. The court scheduled a section 366.26 permanency hearing.

II. DISCUSSION

J.S. contends the juvenile court erred by setting aside the VDP. He argues the VDP required the court to designate him S.S.'s presumed father, and as a presumed father, he was entitled to reunification services and custody.[3]

"The child dependency statutes distinguish between 'biological,' 'presumed,' and 'alleged' fathers. [Citations.] A biological father is one ' "who is related to the child by blood." ' [Citation.] A 'presumed father' is one ' "who 'promptly comes forward and demonstrates a full commitment to . . . paternal responsibilities—emotional, financial, and otherwise[.]" ' [Citation.] A natural father can be a presumed father, but is not necessarily one; and a presumed father can be a natural father, but is not necessarily one.

[3] J.S. does not contend the court should have designated him a presumed father on any basis other than the VDP. We therefore do not address the Agency's argument that J.S. did not meet the requirements for designation as a presumed father under Family Code section 7611, subdivision (d).

[Citation.]' [Citation.] An 'alleged father' 'may be the father of a dependent child. However, he has not yet been established to be the child's natural or presumed father.' " (*In re Jovanni B.* (2013) 221 Cal.App.4th 1482, 1488.) " 'A father's status is significant in dependency cases because it determines the extent to which the father may participate in the proceedings and the rights to which he is entitled. [Citation.] . . . Presumed father status entitles the father to appointed counsel, custody (absent a finding of detriment), and a reunification plan.' " (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.)

The Family Code authorizes unwed parents to sign a VDP as a way "to acknowledge the man's biological paternity of their child." (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1019.) Family Code section 7571, subdivision (a) provides that, after a birth by an unmarried mother, the hospital must inquire about execution of a VDP by the mother and the man "identified by the natural mother as the natural father." The VDP form requires the mother to swear that "the man who has signed the voluntary declaration of paternity is the only possible father" of her child; the father must swear he is "the biological father of the child." (Fam. Code, § 7574, subd. (b)(5)–(6).)

Family Code section 7573 provides that a completed VDP that has been filed with the Department of Child Support Services "establish[es] the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction. The [VDP] shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support." But under Family Code section 7575, if genetic tests show that the man who signed the VDP is not "the father of the child," the court (including a juvenile court presiding over a dependency proceeding) may set the VDP aside.[4] (Fam. Code, § 7575, subd. (b)(1); see *In re J.L.*, *supra*, 159 Cal.App.4th at pp. 1020–1022.)

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[4] We conclude below that the court did not abuse its discretion by setting aside the VDP. We therefore do not address J.S.'s suggestion that a VDP (that has not been set aside) establishes the man who signed it is the presumed father in dependency proceedings. (Compare *In re Jovanni B.*, *supra*, 221 Cal.App.4th at pp. 1491–1492 [signed VDP does *not* entitle declarant to presumed father status in dependency proceeding] with *In re Levi H.* (2011) 197 Cal.App.4th 1279, 1283, 1286, 1290 [signed

Under Family Code section 7575, the court "may set aside the [VDP] unless the court determines that denial of the action to set aside the [VDP] is in the best interest of the child, after consideration of all of the following factors: [¶] (A) The age of the child. [¶] (B) The length of time since the execution of the voluntary declaration of paternity by the man who signed the voluntary declaration. [¶] (C) The nature, duration, and quality of any relationship between the man who signed the voluntary declaration and the child, including the duration and frequency of any time periods during which the child and the man who signed the voluntary declaration resided in the same household or enjoyed a parent-child relationship. [¶] (D) The request of the man who signed the voluntary declaration that the parent-child relationship continue. [¶] (E) Notice by the biological father of the child that he does not oppose preservation of the relationship between the man who signed the voluntary declaration and the child. [¶] (F) The benefit or detriment to the child in establishing the biological parentage of the child. [¶] (G) Whether the conduct of the man who signed the voluntary declaration has impaired the ability to ascertain the identity of, or get support from, the biological father. [¶] (H) Additional factors deemed by the court to be relevant to its determination of the best interest of the child." (Fam. Code, § 7575, subd. (b)(1).) We review for abuse of discretion a trial court's decision whether to set aside a VDP under Family Code section 7575.[5] (*In re William K.* (2008) 161 Cal.App.4th 1, 9.)

VDP established declarant's presumed father status in dependency proceeding and "trump[ed]" presumed father status of another man that arose under Fam. Code, § 7611, subd. (d)].)

[5] J.S. contends we should apply the substantial evidence standard of review applicable to an order denying reunification services under section 361.5, subdivision (b). (See *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.) But J.S.'s specific appellate challenge is to the juvenile court's discretionary decision to set aside the VDP, so we will apply the abuse of discretion standard. (See Fam. Code, § 7575, subd. (b)(1) [court "may" set aside VDP based on a determination of the child's best interest made after considering enumerated factors]; *In re William K., supra,* 161 Cal.App.4th at p. 9.) In any event, we would reach the same conclusion under either standard.

We find no abuse of discretion. S.S.'s young age and the short time she lived with J.S. support the court's decision. (Fam. Code, § 7575, subd. (b)(1)(A) [age of child]; *id.*, subd. (b)(1)(C) [nature, duration, and quality of relationship, including duration and frequency of time periods when child and VDP declarant resided in same household or enjoyed a parent-child relationship].) When the court set aside the VDP in May 2016, S.S. was 10 and one-half months old. As the court noted, J.S. had lived with S.S. for only the first one and one-half months of her life. After the August 2015 domestic violence incident between T.W. and J.S., a criminal protective order prohibited J.S. from having contact with T.W. or S.S. The court noted that, as a result of the August 2015 incident, J.S. sustained a probation violation, and a condition requiring that he stay away from T.W. and S.S. was added to his probation. The court concluded that J.S., through his conduct in connection with the August 2015 incident, put himself in a position where he could not have contact or bond with S.S.

The court also stated it had concerns about the relationship between T.W. and J.S. These concerns were reasonable and supported by information in the Agency's reports. In addition to the August 2015 incident, T.W. had told the Agency that J.S. was abusive and controlling. The Agency reported that J.S. had an extensive arrest record and a history of abusive behavior. The court reasonably could conclude denial of S.S.'s motion to set aside the VDP would not be in S.S.'s best interest.

J.S.'s appellate arguments do not persuade us the court abused its discretion. First, he contends some of the relevant statutory factors would support a decision declining to set aside the VDP, such as his request that his relationship with S.S. continue (Fam. Code, § 7575, subd. (b)(1)(D)) and his active participation in juvenile court proceedings. But in light of the other factors discussed above, the court reasonably could conclude it was not in S.S.'s best interest to deny the motion to set aside the VDP. (See Fam. Code, § 7575, subd. (b)(1).)

Second, as to the nature, duration and quality of his relationship with S.S., J.S. states his contact with S.S. ended only because he properly complied with the no-contact order entered after the August 2015 domestic violence incident. But the court reasonably

concluded this evidence supported setting aside the VDP. The court noted that J.S., through his conduct in the August 2015 incident, "put himself out of the box as far as his opportunity to continue to bond with the minor based on his behavior[.]"

Finally, J.S. notes there is no "competing father[]" involved in the juvenile court proceedings, because the other alleged father never appeared. But as noted, when genetic tests show that the man who signed the VDP is not the biological father, Family Code section 7575, subdivision (b)(1) authorizes the court to set aside the VDP. Participation of the biological father (or a "competing" alleged father) in the proceedings is not a prerequisite to setting aside the VDP.

III. DISPOSITION

The petition is denied on the merits. (See § 366.26, subd. (*l*)(1)(C); Cal. Rules of Court, rule 8.452(h).) This court's stay of the section 366.26 hearing (which was previously set for August 29, 2016) is lifted. Our decision is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

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Streeter, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.